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No. 80-620

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

JOHN J. AYOOB, HUGH IORFIDO, ROSS M. KEEFER, LEWIS E. KIRCHNER, JOSEPH LIBERATI, STEPHEN MIHALIC, ARTHUR L. SCHLEMMER, GEORGE L. SHAFFER, MILTON H. RICHEAL, individually and as District Magistrates in the County of Beaver and their successors in office,

Petitioners

v.

PATRICIA MORRISON, BLANCHE LOWE, RACHEL DAWKINS, GEORGE BLACK, and all others similarly situated,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MOTION FOR LEAVE TO FILE AND

BRIEF AMICUS CURIAE OF THE HONORABLE ALEXANDER F. BARBIERI, ADMINISTRATOR OF PENNSYLVANIA COURTS, IN SUPPORT

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Brief Amicus Curiae of the Honorable Alexander F. Barbieri, Administrator of Pennsylvania Courts, in Support of the Petition for Writ of Certiorari

THE INTEREST OF THE HONORABLE ALEXANDER F. BARBIERI IN THESE PROCEEDINGS

The United States Court of Appeals for the Third Circuit stated that the district court could fix liability for the payment of attorneys' fees upon the Administrator of Pennsylvania Courts because the circuit court determined that the court administrator "actively participated in all phases of the case" (Slip Opinion at pp. 7-8). This statement is clearly erroneous insofar as the court administrator never entered his appearance, nor did he participate in the proceedings other than to provide legal representation to the district magistrate defendants, pursuant to his official duties. For these reasons, Judge Barbieri was not afforded notice or an opportunity to be heard on this issue.

Judge Barbieri serves the judiciary of Pennsylvania by providing it legal counsel. In this brief, he provides all the judges of Pennsylvania an opportunity to be heard on a most critical issue, the substantial abrogation by the circuit court of the Common Law principle of judicial immunity, which until now insured that the public had access to impartial tribunals capable of affording due process in an atmosphere unencumbered by the fear of litigation and harassment.

BRIEF SUBMITTED PURSUANT TO RULE 36.4

The Honorable Alexander F. Barbieri, Administrator of Pennsylvania Courts, submits this brief in *amicus curiae* pursuant to Rule 36.4 of the United States Supreme Court Rules.

MOTION FOR LEAVE TO FILE

Alternatively, consent for the filing of this brief having been refused by counsel for the Respondent, Judge Barbieri moves this Honorable Court to accept this brief on behalf of, in part, the judicial branch of the Commonwealth of Pennsylvania, which is represented at all times and in all proceedings by the Legal Department of the Administrative Office of Pennsylvania Courts. (The Office of the Attorney General of Pennsylvania does not represent the judicial branch [see p. 30b of Petitioner's Appendix]).

ARGUMENT

At issue in this case is whether, by enacting the Attorneys' Fees Awards Act of 1976, 42 U.S.C. §1988 (Supp. 1980) ("1988"), Congress intended to abrogate the Common Law doctrine of absolute judicial immunity with respect to fee awards, and if it did so intend, whether that action of the legislative branch was violative of the constitutional guarantee of Due Process and of the principle of Separation of Powers.

I. The court below erred in concluding: (1) that this Court conceded that Congress could abolish the Common Law doctrine of judicial immunity at will; (2) that Congress in the passage of 42 U.S.C. §1988 provided a clear indication and a specific provision which manifest an intent to abolish the doctrine. Aside from these commissions of error, the opinion of the Third Circuit Court of Appeals does not consider the interests competing in this issue to the degree necessary to engender confidence in the result — one of far-reaching and catastrophic dimensions.

One question presented to the United States Court of Appeals for the Third Circuit in this matter was whether the doctrine of judicial immunity bars recovery of attorneys' fees by a prevailing party under §1988 from judicial officers in their official capacity. That court held that it did not.

The court below reached this erroneous conclusion using a two-step analysis. Firstly, the court inferred, and it is submitted, incorrectly, that this Court indicated in *Pierson v. Ray*, 386 U.S. 547, 554-55, 18 L.Ed. 288, 295, 87 S. Ct. 1213 (1967), that Congress may abolish the doctrine of judicial immunity, adopted by this Court in *Bradley v. Fisher*, 13 Wall. 335, 20 L.Ed. 646 (1872), when it sees fit (elsewhere in this petition, it is submitted the legislative branch cannot do so without violating the Constitution).

What this Court held in *Pierson v. Ray, supra,* was that this settled principle of the law was not abolished by 42 U.S.C. §1983. The Court observed that the legislative record gives no clear indication that Congress meant to abolish wholesale all common-law immunities. The Court would not presume that an abrogation had been attempted without a specific provision to that effect. What was not determined in *Pierson* was whether Congress had the right to abolish the doctrine of judicial immunity adopted by this Court in *Bradley v. Fisher, supra.*

It is a basic proposition that this Court will adopt one of two possible constructions of a statute which will save and not destroy it, and the Court will not attribute to Congress an intent to defy the due process clause of the Fifth Amendment to the Constitution of the United States or even to come so near to doing so as to raise serious questions of constitutional law. *Anniston Mfg. Co. v. Davis,* Ala. 1937, 57 S. Ct. 816, 301 U.S. 337, 81 L. Ed. 1143, rehearing denied. 58 S. Ct. 3, 302 U.S. 772, 82 L. Ed. 599. Thus, when this Court concluded that Congress, in the passage of 42 U.S.C. §1983, did not manifest an intent to abolish judicial immunity, it did not of necessity conclude that had Congress meant to do so, it would have had a commensurate right.

That this Court in *Pierson v. Ray, supra,* was construing §1983 to save it is evidenced by the Court's repetition immediately prior to its holding on this issue of the language in *Scott v. Stansfield.* L.R. 3 Ex. 220, 223 (1868), quoted in *Bradley v. Fisher, supra,* 349; note, at 350, 20 L.Ed. at 650:

> . . . it "is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences."

The Court continued:

> It is the judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants.
>
> . . .
>
> . . . he should not have fear that unsatisfied litigants may hound him with litigation . . . . Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation.

Having first stated that the doctrine of judicial immunity preserved the independence of the judiciary to the sole benefit of the public, it is submitted the Court cannot be said to have tacitly conceded that Congress, while not intending that time to abolish this keystone of judicial process, could do so at any time it liked.

The second step in the Third Circuit's analysis was the conclusion that the legislative history of §1988 indicated that Congress expressly considered judicial immunity and decided to abrogate it.

It is submitted that the conclusion which the lower court would have to have reached not to err is that Congress has given a clear indication in the form of a specific provision. See *Pierson v. Ray, supra,* at 18 L.Ed. 294-295. As Petitioner observes, the evidence of Congressional intent is at best ambiguous and could hardly be considered a specific provision of the sort necessary to manifest a Congressional intent to abolish a well and solidly established common law doctrine necessary for proper judicial function. See *Pierson v. Ray, supra,* 18 L. Ed. at 294-295.

The abolition of the doctrine of absolute judicial immunity, assuming arguendo that this is an appropriate and lawful action, should not occur at the instance of a legislative footnote or on the basis of an appellate opinion that ignores totally the conflicting policy issues which

must be addressed before confidence in a result will be instilled in the judiciary and the public served.

II. Assuming arguendo that Congress intended to abolish judicial immunity with the passage of the Attorneys' Fees Awards Act, this action by the legislative branch of government is in violation of Constitutional guarantees of fundamental fairness and due process.

The Fifth Amendment to the Constitution of the United States announces and reaffirms the ancient principles of Common Law and prevents them from being unjustly invaded by the power of the federal government.

This clause is a restraint and limitation on the legislative as well as on the executive and judicial powers of the government and cannot be so construed as to leave Congress free to make any process "due process of law" by mere will. *Murray v. Hoboken Land, etc., Co.*, N.J. 1856, 59 U.S. 277, 18 How. 277, 15 L. Ed. 372. The amendment forbids the federal government from depriving any person of life, liberty or property without due process of law. *Bloom v. State of Illinois*, Ill. 1968, 88 S. Ct. 1477, 391 U.S. 194, 20 L. Ed.2d 522. And it is this Court which is the final arbiter of due process under the Constitution. *Gallagher v. Quinn*, 1966, 363 F.2d 301, 124 U.S. App. D.C. 172, cert. denied 87 S. Ct. 167, 385 U.S. 881, 17 L. Ed. 2d 108.

Due process of law guaranteed by the Fifth Amendment is a primary and indispensable foundation of individual freedom. It expresses in its ultimate analysis respect enforced by law for that feeling of just treatment which has evolved through centuries of Anglo-American constitutional history and civilization. Judicial immunity which guarantees that parties will receive a fair trial in a fair tribunal is a basic requirement of due process and is an ancient doctrine whose intent it is to prevent even a probability of unfairness. The right to fair trial may not

be abrogated under any circumstances, e.g., even if evidence of guilt of a criminal defendant is overwhelming. *Imbler v. Craven,* D.C. Cal. 1969, 298 F. Supp. 795, affirmed 424 F.2d 631, cert. denied, 91 S. Ct. 100, 400 U.S. 865, 27 L. Ed. 2d 104. The influences from which the tribunal must be guarded against to insure that a fair trial is afforded have been enumerated and delineated extensively in the area of jury trials, because, up until the point of the Third Circuit's action in this matter, the judiciary's freedom from influence was assured. For example, where outside influences affecting a community's climate of opinion as to a defendant are inherently suspect, the resulting probability of unfairness requires suitable safeguards, such as change of venue, to assure a fair and impartial trial. *Pamplin v. Mason,* C.A. Tex. 1966, 364 F.2d 1. Under the holding of the Third Circuit in this matter, however, there is no escape to another locality, for all judges must now stand in fear of the litigants before them, with the result that no litigant can be assured of receiving due process.

The independence of the judiciary from vexatious lawsuits of dissatisfied parties and from the branch of government which would be called upon to indemnify a judge against whom a judgment has been obtained must remain intact to avoid a chill on the unbiased discretion and decisions of judicial officers.

Absent a cloak of judicial immunity, the very source of justice would be poisoned, and a system would be introduced that could best be characterized as servile and incapable of impartiality as it was conceived in the concept of due process. See *Taaffee v. Downes,* 13 Eng. Rep. 15, 17 (C.P. Ireland, 1813); *Lining v. Bentham,* 2 S.C.L. (2 Bay) 1, 3 (1796). Examined from another point of view, the doctrine of immunity insures that there is some finality in the judicial proceedings — some point in the administration of the law where unqualified confidence is to be reposed and acknowledged. Further, where a judge must spend one hour at the bar — next at

the bench, of the same or some other court, he will have a busy and harassing time, getting from one point to the other — from the Judge to the accused — from the corrector to the corrected. Thus, it is a great diseconomy and disservice to the public to poison the wells of justice for the sake of providing an incentive to civil rights litigants where one of the greatest civil rights of all, due process, is destroyed in the balance.

Without the doctrine of immunity, responsible and capable persons will be discouraged from seeking judgeships, for they will be unwilling to risk their property and time defending against litigants offended by adverse decisions. And, as the Petitioners observe, the imposition of attorneys' fees on those who are judges produces no different effect upon judicial discretion and decision making processes than does the imposition of damages. Quite simply, there is no distinction between damages and awards which justify the abrogation of what this Court referred to as a solidly established policy of judicial independence for the benefit of the public. *Pierson v. Ray, supra,* 18 L. Ed.2d 294-295.

While it may be argued that because the government unit the judges serve will actually pay the fee awards and that, therefore, judicial independence will remain unencumbered, this logic is faulty. Firstly, were this the case, no harm would come from the assessment of damages. Secondly, the award against the judge would be reported to the public as such, creating in the judge's mind a fear that confidence in his abilities will be eroded no matter who pays the bill. Thirdly, the state may develop defenses or otherwise delay in paying awards, with the effect of making the judiciary dependent on that branch which disburses the funds.

The policy behind judicial immunity, i.e., insuring that there is some place where the probability of receiving due process is maximized, must not be abrogated, let alone summarily, either by the legislature or the judiciary.

III. Under the principle of separation of powers, the legislature is prohibited from encroaching on, or unduly burdening or interfering with, the judicial department in its exercise of judicial functions. Congress could not abrogate judicial immunity without violating this principle.

Judicial immunity arose because it was in the public interest to have judges who were at liberty to exercise their independent judgment about the merits of a case without fear of being mulcted for damages should an unsatisfied litigant be able to convince another tribunal that the judge acted not only mistakenly but with malice and corruption. *Dennis v. Sparks, etc.*, 49 U.S.L.Week 4003 (U.S. November 17, 1980).

Independence from that branch of government which would be called upon to indemnify the judiciary is equally necessary to avoid a posture of servility. Also to be avoided is the risk that another branch of government will impose upon the judiciary informal or formal sanctions for the latter's loss of a controversy.

The constitutional measures for controlling the judiciary are appellate process, criminal prosecutions, see *O'Shea v. Littleton*, 414 U.S. 488, 503 (1974), legislation running to jurisdiction and powers, peer review and the like. But, when the power of the judiciary is eroded to the extent that due process cannot be afforded with ease, the judiciary is no longer a co-equal branch of government, for it can no longer perform the function for which it exists.

An examination of this Court's most recent opinion in the case of *Dennis v. Sparks, etc.*, 49 U.S.L.Week 4001 (U.S. November 17, 1980) reveals the extent to which judicial immunity is inherent and necessary to the operation of the judicial branch. There, this Court had an opportunity to decide that where a judge conspires to commit a judicial act for unlawful purposes (in *Dennis*,the violation of 42 U.S.C. §1983) the judge's part

in the conspiracy is not a judicial act, nor within his jurisdiction. Yet, this Court determined that judicial immunity attached under these circumstances. Because the judge was immune to a damage action in *Dennis*, attorneys' fees could not have been assessed under §1988. Yet, under the rationale of the case at bar, if the plaintiffs in *Dennis* had applied for injunctive relief and prevailed, attorneys' fees could have been awarded. This is antithetical to the concept of judicial immunity and internally inconsistent. If incentive for vindication of civil rights is not to be provided in damage actions, why should request for any other remedy which imposes financial liability be treated any differently?

IV. Fundamental concepts of due process were violated when the appellate court held that Judge Alexander F. Barbieri could, at the district court's discretion, be held liable for counsel fees where he received neither notice nor opportunity to be heard and where his only connection with the matter at bar was his provision of legal counsel to judicial defendants.

The State Court Administrator in Pennsylvania is a constitutional officer and his office is created by state statute. *See Pa. Const., Art.* V, §10; 42 Pa. C.S. §1901, *et seq.* The functions of the Administrator's Office are limited to those stipulated by the Supreme Court in its Rules of Judicial Administration. See Pennsylvania Rules of Judicial Administration, Pa. Rules of Court 1 (West, 1980). The Administrator is not responsible for the judicial conduct of district justices.

However, in Pennsylvania, the Legal Department of the Administrative Office of Pennsylvania Courts provides legal representation to the judicial branch of Pennsylvania government. This service is not provided by the Office of the Attorney General of the Commonwealth of Pennsylvania. While Judge Barbieri instructed the attorneys of the Legal Department to counsel the judicial de-

fendants in the proceedings below, at no time did those counsel enter their appearance on behalf of Judge Barbieri nor did Judge Barbieri actively participate in any phase of this case. Thus, the rationale of the United States Court of Appeals for the Third Circuit that because Judge Barbieri did enter his appearance and did participate he could be held responsible for attorneys' fees is clearly and absolutely erroneous. (Slip Opinion pp. 7-8).

Judge Barbieri was not a party to this litigation and was not interested in the result, being neither bound nor benefited by the resulting judgment. He neither participated in this litigation nor did he have an adequate opportunity to defend against the result which may make him responsible for attorneys' fees awarded. Even were it to be argued that the Court Administrator had an academic interest in the determination of a question of law, this is not a sufficient interest. *Bigelow v. Old Dominion Copper Mining & Smelting Co.* (1912), 225 U.S. 111, 32 S. Ct. 641, 56 L. Ed. 1009.

That Judge Barbieri provided counsel to the defendants below pursuant to his duties as the Administrator of Pennsylvania Courts does not change the conclusion that he did not actively participate. See *McIlhenny Co. v. Gaidry* (CCA 5th, 1918) 253 F. 613; *Cofax Corporation v. Minn. Mining & Mfg. Co.*, (S.D.N.Y. 1947) 79 F. Supp. 842; *Thaxton v. Naughan*, (4th Cir. 1963), 321 F.2d 474, 479.

CONCLUSION

For the above stated reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Third Circuit Court of Appeals.

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that on this 5th day of December 1980, I personally caused to be served by mailing, prepaid and first class, United States Mail, three copies of the Brief Amicus Curiae of the Honorable Alexander F. Barbieri, Administrator of Pennsylvania Courts, in support of the Petition for Writ of Certiorari, in the above matter, to:

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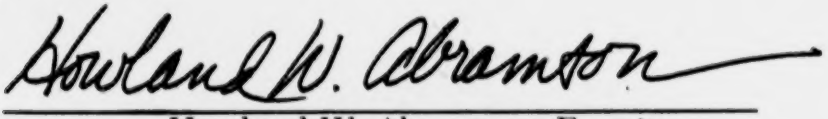

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